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October 25, 2006

Ex Parte Presentation

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TW-325
Washington, DC 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association, Petition for Declaratory Ruling

Dear Ms. Dortch:

On behalf of the American Public Communications Council ("APCC"), we sent today to the persons listed under "cc" below the enclosed legal analysis of the Commission's statutory obligation to require the Bell Companies to refund payphone line charges collected in excess of NST-compliant levels.

Sincerely,

Robert F. Aldrich

Robert F. Aldrich

Enclosure
cc: Daniel Gonzalez
Michelle Carey
Scott Deutchman
Scott Bergmann
Christopher Killion
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SECTION 276 OF THE ACT REQUIRES REFUNDS OF PAYPHONE LINE CHARGES IN EXCESS OF NST-COMPLIANT RATES

American Public Communications Council

October 25, 2006

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SUMMARY

Refunds are the legally required remedy for the Bell Companies' protracted failure to bring their payphone line rates into compliance with the new services test ("NST") requirement mandated by Section 276 of the Communications Act (the "Act").[1] It is axiomatic that ratepayers are entitled to reparations when carriers assess unreasonable or unjustly discriminatory rates.[2] Without refunds, moreover, there is no effective remedy for the Bell Companies' prolonged assessment of payphone line rates that indisputably did not comply with the NST.[3] In maintaining grossly excessive rates for periods ranging from five to nine years

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1 47 U.S.C. §§ 276(a), (b)(1)(C). The statutory reparations analysis discussed in this paper is one of two independent legal theories justifying the award of refunds to payphone service providers ("PSPs"). In a previous paper, we showed that the Common Carrier Bureau's 1997 order waiving the April 15, 1997, deadline for NST compliance unequivocally required the Bell Companies to refund any excess over NST compliant rates for the period from April 15, 1997, until the date that NST-compliant rates became effective. *See Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 ¶ 20 (CCB 1997)("*Waiver Order*"). *See also* APCC ex parte, "The Waiver Order Requires Refunds from the Date NST-Compliant Tariffs Became Effective Back to April 15, 1997," (filed September 12, 2006). This paper addresses the alternative ruling that the Commission must adopt in the event that it rejects the *Waiver Order* interpretation advanced by APCC and other payphone associations, and determines that the refunds specifically required by the *Waiver Order* were limited, *e.g.*, to rates that the Bell Companies unilaterally determined were in need of revision. In that event, the Commission must still find that PSPs are entitled to reparations, in the form of refunds, because reparations are the legally required remedy for the Bell Companies' prolonged noncompliance with Section 276.

2 *See* cases cited in footnote 10 below.

3 The Bell Companies' payphone line rates at issue here were not just slightly excessive; they were frequently more than twice as high as NST-compliant levels. For example, the Northwest Public Communications Council submitted an exhibit comparing illustrative payphone line rates charged by Qwest before and after it revised the rates to comply with the NST. *See* Letter to Marlene H. Dortch, Secretary, from Brooks Harlow, attorney for the Northwest Public Communications Council, attachment entitled "Illustrative Qwest PAL Rates Before and After NST-Compliance" (May 5, 2006). In its 14-state region, according to the exhibit, Qwest charged payphone line rates ranging from \$28.10/month in Wyoming up to

after compliance was required by law, the Bell Companies committed egregious violations of Section 276. As we explain below, the only available remedy to correct this noncompliance is to make the Bell Companies comply retroactively by refunding to PSPs the excess revenues that the Bell Companies gained through their non-compliance at PSPs' expense.

Accordingly, the Commission must rule that PSPs are entitled to refunds of the excess over NST-compliant rates from April 15, 1997, until the dates that NST-compliant rates became effective. The Commission must also rule that any contrary state rulings are preempted pursuant to Section 276(c) of the Act. 47 U.S.C. § 276(c). The Commission's referral of the review of payphone line rates to state public service commissions does not alter the Bell Companies' liability for violations of federal law. It is well established that the Commission cannot subdelegate to the states responsibilities that Congress has placed on the Commission alone. Allowing inconsistent state rulings to stand would mean impermissibly abdicating the Commission's responsibility to ensure that the Bell Companies comply with Section 276.

Finally, there are no other obstacles to the Commission issuing the necessary ruling; neither federal nor state filed-rate and retroactive ratemaking doctrines are applicable here.

I. REPARATIONS ARE LEGALLY REQUIRED AND ARE THE ONLY EFFECTIVE REMEDY FOR THE BELL COMPANIES' YEARS OF NON-COMPLIANCE WITH SECTION 276

In failing to comply with the NST, the Bell Companies committed clear violations of the Communications Act. Section 276(a)(2) of the Act prohibits the Bell Companies from

(Footnote continued)
$58.74/month in Idaho. After Qwest filed revised rates to comply with the NST, its payphone line rates plunged to levels ranging from $9.73/month to $24.79/month. On average (taking the median of the percentage differences in the illustrative rates), Qwest's pre-NST rates were 147% higher than its post-NST rates. In other words, NST compliance resulted in an average 60% reduction in Qwest's payphone line rates.

discriminating in favor of their own payphone services. 47 U.S.C. § 276(a)(2). Section 276(b)(1)(C) requires the Commission to prescribe safeguards to implement the nondiscrimination requirement, "including, at a minimum" safeguards equivalent to those adopted by the Commission in the *Computer III* proceedings. *Id.* § 276(b)(1)(C). In the *Payphone Orders,* the Commission found that the NST is one of the "minimum" safeguards necessary to ensure nondiscrimination.[4] Therefore, to comply with the Act, Bell Companies were required to set their payphone line rates in accordance with the NST.[5] By failing to comply with the NST, the Bell Companies violated Section 276(a)(2) of the Act.

The Act required an end to all Bell Company subsidies and discrimination no later than the effective date of the Commission's implementing regulations, which the Commission set at April 15, 1997. 47 U.S.C. § 276(a). Timely compliance by the Bell Companies was an essential step in the transition to a fully competitive payphone market with "widespread deployment of payphone services." 47 U.S.C. § 276(b). As of April 15, 1997, the old regime of subsidies and discrimination was to be replaced by a competitive regime in which the same market constraints and revenue opportunities applied to both Bell Companies and independent PSPs. As of April 15, 1997, Bell Companies became entitled, for the first time, to join independent PSPs in collecting compensation from interexchange carriers ("IXCs") at the Commission-prescribed rate for "each and every" dial-around call made from their payphones. *See* generally 47 U.S.C. § 276(b)(1)(A); 47 C.F.R. §§ 64.1300-20. To ensure that the Bell Companies gave up the

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[4] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541, 20614 ¶ 146 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233, 21308 ¶ 163 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part, Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied, Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) (collectively "*Payphone Orders*").

[5] *Wisconsin Public Service Commission*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2052 ¶¶ 2, 39, (2002) ("*Wisconsin Order*"), *aff'd New England Pub. Comms. Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

subsidies and preferences they enjoyed under the old regulated regime before gaining the benefits of the new competitive regime, the *Payphone Orders* specified that the Bell Companies would not be eligible for dial-around compensation until they complied with all the Commission's competitive safeguards, including the NST requirement.[6]

The Bell Companies not only violated the Act and disrupted the market transition contemplated by Section 276, but also continued to resist compliance with the Act, year after year. Asserting that the NST allowed them "virtually unlimited flexibility" in setting the overhead cost component of rates, the Bell Companies attempted to maintain payphone line rates far in excess of cost-based, NST-compliant levels.[7] They even challenged the Commission's authority to require NST compliance -- after having acquiesced in the Commission's jurisdiction in order to obtain the waiver of the deadline. *Id.* at 2060 ¶ 31 & n. 74. As a result, in the states involved in this proceeding, the Bell Companies remained out of compliance with the NST for five to nine years,[8] collecting millions of dollars in excess payphone line charges while at the

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6 *First Payphone Reconsideration Order*, 11 FCC Rcd at 21308 ¶ 131. *See also Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, 21013 ¶ 35 (CCB 1997)("*Clarification Order*"); *Waiver Order* at 21370 ¶ 1. The Bell Companies were required to file state payphone line tariffs and cost support by January 15, 1997, so that the rates could be reviewed under the NST and could take effect by April 15, 1997. On April 10, 1997, the Bell Companies requested a waiver of these deadlines, claiming they had not understood that the state-filed tariffs had to comply with the NST. Under the waiver granted by the Common Carrier Bureau, the deadline for NST compliance filings was extended until May 19, 1997. *Waiver Order* at 21379 ¶ 19.

7 *Wisconsin Order*, 17 FCC Rcd at 2068 ¶ 55. In that proceeding, the Bell Companies argued to the Commission that "any overhead loading [they] might choose is 'reasonable' for purposes of the new services test as long as it is justified by 'some plausible benchmark.'" *Id.* (citation omitted).

8 In the Qwest states subject to the primary jurisdiction referral in *Davel v. Qwest Corp.*, 2006 WL 1727426, *1 (9th Cir. 2006) ("*Davel*"), Qwest did not file NST-compliant rates until 2002, five years after the compliance deadline. In Illinois, AT&T's payphone line rates remained out of compliance until December 2003, more than six-and-a-half years after the deadline. *See* Illinois Public Telecommunications Association, Petition for Declaratory Ruling at 6 (July 30, 2004). In Mississippi and Florida, BellSouth's payphone line rates were not brought into NST compliance until October 1, 2003, and November 10, 2003, respectively. *See* Southern Public Communications Association, Petition for Declaratory Ruling at 4 (November 9, 2004);

same time collecting *billions* of dollars in dial-around compensation for which they were not even eligible.[9]

In the *Payphone Orders*, the Commission set the April 15, 1997, compliance deadline with the expectation that three months (from the January 15, 1997, tariff filing deadline) would be sufficient time for state commissions to ensure that the Bell Companies complied with the NST. Even after granting the Bell Companies a waiver extending the NST filing deadline to May 19, 1997, the Commission still expected that state commissions would be able to complete their review of payphone line rates "within a reasonable time." It is clear that the Commission never expected it could take up to nine years for the Bell Companies to comply. The

(Footnote continued)
Petition of the Florida Public Telecommunications Association, Inc., for a Declaratory Ruling and for an Order of Preemption at 8 (January 31, 2006). In Massachusetts, the public service commission did not require Verizon to bring its rates into compliance until six-and-a-half years after the rate proceeding began. *See* Comments of the New England Public Communications Council, Inc., at 3 (August 26, 2004). Finally, in New York, where the Independent Payphone Association of New York ("IPANY") challenged Verizon's payphone line rates in early 1997, Verizon was able to stall any order addressing its non-compliant payphone line rates until 2006.

[9] There is some confusion in this proceeding on the issue of the Bell Companies' eligibility for compensation. Some of the Bell Companies try to contend that, while the Bell Companies had to "be able to certify" that they were NST-compliant, they did not necessarily have to actually *be* NST-compliant in order to be eligible for compensation. *See, e.g.,* Letter to Marlene H. Dortch from Robert B. McKenna, Associate General Counsel, Qwest at 7 (June 22, 2006) (the "certifications were self-effectuating in that the Commission did not need to approve or examine Qwest's payphone tariffs to affirmatively determine that they complied with the 'new services' test"). This contention is contradicted by the Commission's orders. In *Bell Atlantic-Delaware v. Frontier Comms. Services*, Memorandum Opinion and Order, 14 FCC Rcd 16050, 16068 ¶28 (CCB 1999), the Common Carrier Bureau stated:

> We emphasize that a [local exchange carrier's ("LEC's")] certification letter does not substitute for the LEC's obligation to comply with the requirements as set forth in the *Payphone Orders*. The Commission consistently has stated that LECs must satisfy the requirements set forth in the *Payphone Orders*, subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the LEC's compliance . . . is a function solely within the Commission's and state's jurisdiction. . . . [T]he Commission specifically delegated to the Common Carrier Bureau the authority to determine whether a LEC has complied with the compensation eligibility prerequisites.

Commission must now decide what if any remedy is appropriate to address the Bell Companies' protracted violations of law.

The answer is clear. The statutorily prescribed remedy for discrimination that violates the Act is reparations. Carriers who violate the Act "*shall be* liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation . . . ." 47 U.S.C. § 206 (emphasis added). Moreover, notwithstanding the Bell Companies' arguments to the contrary, reparations are a normal and necessary remedy for unreasonable or discriminatory tariffed rates.[10] And, unlike the refunds that the Commission is authorized to provide in its ratemaking process (*id.* § 204(a)(1)), the reparations required by Sections 206-208 of the Act are mandatory, not discretionary. *See MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995). Under the Act, Bell Companies who failed to timely comply with the

[10] *See* 47 U.S.C. 208(b) (authorizing damage awards when the Commission adjudicates "the lawfulness of a charge"); *Arizona Grocery Co. v. Atchison, T. & S. Ry. Co.*, 284 U.S. 370 (1932); . *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) (In Section 208 overearnings complaint proceedings, unlike Section 204 actions, a finding that a rate is unreasonable, based on the carrier's earning more than the prescribed rate of return, is by itself sufficient to require an award of damages); *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) (in adjudicating a Section 208 complaint that a competitive LEC's access rates were unreasonable, Commission has authority to determine retroactively that rates were unreasonable and to specify the reasonable rate for purposes of awarding damages); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomms. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568 ¶ (1998) (even though non-dominant carriers' rates are presumed reasonable that presumption may be rebutted and damages awarded in a Section 208 complaint proceeding); *ACC Long Distance Corp. v. New York Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd 1659, 1661-62 ¶ 11 (1994) (in overearnings complaint proceeding, Commission rejects argument that it cannot order refunds under Section 208 unless it first suspended the rates pursuant to Section 204); *MCI Telecomms. Corp. v. Pacific Northwest Bell Tel. Co., et al., Memorandum Opinion and Order*, 5 FCC Rcd 216, 221-22 ¶ 48 (1993) (in Section 208 overearnings complaint proceeding, Commission rejects argument that it cannot order refunds of a legally tariffed rate); *Cruces Cable Co., Inc., v. American Television Relay, Inc.*, 35 FCC 2d 707, 709 (1972) (Where rate was filed on one day's notice, and customer challenged the rate as unlawfully discriminatory and requested interim rate relief, Commission denied interim relief because "under Sections 206 and 207 of the Communications Act, [the customer] is entitled to recover damages for any violation of the Act which may be found either upon complaint to this Commission or upon suit in federal court").

NST must pay reparations to PSPs for the excessive rates charged from April 15, 1997, until NST-compliant rates became effective.

Reparations is not only the statutory remedy, it is the only effective remedy for the Bell Companies' years of noncompliance. In theory, since the Bell Companies have been collecting dial-around compensation while they were ineligible, they could be required to disgorge all the compensation collected from April 15, 1997, until the date that NST-compliant rates became effective. This remedy, however, would provide a windfall to the IXCs who paid the compensation, giving them free use of the Bell Companies' payphones for that entire period.[11] Imposing penalties or forfeitures would be equally ineffective, in light of the vast scale of the Bell Companies' noncompliance, involving billions of dollars of illegally collected dial-around compensation. Moreover, it is clear that the purpose of the Section 276 nondiscrimination requirement is to protect PSPs. Requiring the Bell Companies to return (largely to their own affiliates) the dial-around compensation previously collected or to pay millions of dollars to the U.S. Treasury would do nothing to make the PSPs whole for their injury suffered as a result of the Bell Companies' noncompliance, or to ensure that the Bell Companies' retroactive comply with Section 276.

Yet, leaving the Bell Companies' massive, long-term noncompliance unremedied is not a permissible option. It would be equivalent to making a decision that it is not necessary for the Commission to implement or enforce the requirements of Section 276. The statute places the

[11] In any event, requiring the Bell Companies to return the compensation collected from IXCs would be largely an empty remedy at this point. Now that each of the two largest Bell Companies has merged with one of the two largest IXCs, the overwhelming bulk of the returned compensation would be merely transferred from one corporate pocket to another, or else traded between the two giants in a roughly equal exchange.

responsibility for implementing and enforcing its requirements squarely on the Commission. The Commission has no authority to waive the Bell Companies' non-compliance.[12]

By ruling that the Bell Companies must provide refunds of the excessive payphone line charges, the Commission not only will ensure that the PSPs as the injured parties are made whole, but also will correct the Bell Companies' violation of the Section 276(a) by providing retroactive compliance back to April 15, 1997. The Commission would thus ensure, notwithstanding the utter lack of timely compliance with the NST, that its Section 276(b)(1)(C) regulations do, ultimately, "implement the provisions of [Section 276(a)]."

II. ALLOWING STATE REGULATORS TO REVIEW RATES FOR NST COMPLIANCE DOES NOT RELIEVE THE COMMISSION OF ITS OBLIGATION TO ENSURE COMPLIANCE WITH SECTION 276

The legally required remedy for the Bell Companies' violations of Section 276 does not change merely because the Commission allowed review of NST compliance to be performed by state public service commissions.[13] In allowing state commissions to *review* payphone line rates for NST compliance, the Commission did not deprive PSPs of a federal *remedy* for noncompliance with federal law.[14] The Commission could not and did not relieve carriers of

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[12] The Commission implicitly recognized this in the *Payphone Orders* when it retained jurisdiction "to ensure that all [*Payphone Orders*] requirements . . . have been met." *Waiver Order*, 12 FCC Rcd at 21379 ¶ 19, n.60; *North Carolina Utilities Commission,* Order, 13 FCC Rcd 5313, 5314 ¶ 2 (CCB 1998).

[13] Initially, the Commission required the Bell Companies to file their payphone line tariffs with the Commission. *First Payphone Order*, 11 FCC Rcd at 20614 ¶ 146. On reconsideration, at the Bell Companies' urging, the Commission chose to rely on state commissions to review the Bell Companies' payphone line tariffs for compliance with the NST and other Section 276 safeguards. In so doing, however, the Commission did not reduce its responsibility to enforce Section 276. *See* footnote 12 above.

[14] The Commission specified that it was "relying on state commissions to ensure that payphone services are tariffed *in accordance with the requirements of Section 276.*" *First Payphone Reconsideration Order* ¶ 163 (emphasis added). As discussed above, the Commission's referral of NST review to state commissions cannot deprive PSPs of a federal remedy for the Bell Companies failure to timely comply with the NST. It is thus of no

their obligations under Section 276, or of their liability for damages if they failed to comply with Section 276. The Commission had no authority to do so.

The Bell Companies argue, however, that just because the Commission chose to allow NST *review* by the states, it must defer absolutely to the judgments of state commissions as to the appropriate *remedy* for the Bell Companies' non-compliance with the Act.[15] Again, the Commission had no authority to accord the states such absolute deference. As noted above, the Commission explicitly retained jurisdiction to ensure that the Bell Companies complied with all the *Payphone Orders* requirements, including the application of the NST to state-tariffed payphone line rates.[16] The Commission also delegated authority to the Common Carrier Bureau to "make any necessary determinations as to whether a LEC has complied with all [Section 276] requirements." *First Payphone Reconsideration Order* at 21294 ¶ 132.

In the *Wisconsin Order*, the Commission did exercise its retained jurisdiction by issuing rulings that clarified the *Payphone Orders'* requirements and guided state commissions' efforts to "ensure compliance with the *Payphone Orders* and Congress' directives in section 276."[17]

(Footnote continued)
consequence that this matter comes before the Commission in the form of petitions for declaratory ruling rather than Section 208 complaints. The PSPs were seeking relief from state commissions as instructed by the Commission and it would have made no sense to initiate a Section 208 complaint while state proceedings were pending. In any event, Section 208 complaints can only be brought against carriers, not state commissions.

15 Qwest, for example, argues that, while "[t]he Commission clearly had the right to assume control over any part of the process by revoking delegation to a state and requiring federal tariffs," nevertheless "barring such revocation, the ultimate authority for determining . . . whether refunds were due and owing if a tariff was found to be unreasonable, was left to the state regulators." Letter to Marlene H. Dortch from Robert B. McKenna at 13 (September 5, 2006) ("Qwest Ex Parte").

16 *Waiver Order* at 21379 n. 60; *North Carolina Utilities Commission,* Order, 13 FCC Rcd 5313, 5314 ¶ 2 (CCB 1998). *See* footnote 12 above.

17 *See, e.g., Wisconsin Order,* 17 FCC Rcd at 2052 ¶ 2. The Commission, of course, is the most authoritative interpreter of its own orders. *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

Here, a Commission ruling is once again necessary to "ensure compliance" with the *Payphone Orders* and . . . Section 276." Indeed, such a ruling has been specifically requested, not only by the PSPs themselves, but also by a state commission and state and federal courts of appeals.[18] As noted above, in order to "ensure compliance" the Commission must undo the Bell Companies' years of *non*compliance, by requiring them to refund the excess charges back to April 15, 1997.

If the Commission fails to correct state commissions' and courts' misinterpretations and misapplications of clear federal law, it will have failed to carry out its responsibilities under Section 276 of the Act. Section 276 gave the Commission the sole authority and responsibility to issue regulations carrying out its provisions. Those regulations required – as they had to in order to comply with Section 276(a)(2)[19] – that the Bell Companies must comply with the NST no later than the effective date of the Commission's Section 276(b) regulations – *i.e.*, no later than April 15, 1997.

As the D.C. Circuit recently made clear, the Commission's authority to rely on state public service commissions to handle the Commission's statutory responsibilities is extremely limited.[20] Simply put, the Commission "may not subdelegate [decision-making authority]

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[18] *See* Letter to Chairman Kevin Martin from Lee Beyer, Chairman, Oregon Public Utility Commission (November 23, 2005); Public Notice, DA 06-780, *New England Public Communications Council, Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996* (April 3, 2006); Petition of Davel Communications, Inc., et al. for Declaratory Ruling (September 11, 2006).

[19] As noted above, Section 276(a)(2) prohibited Bell Companies from discriminating in favor of their own payphone operations at any time after the effective date of the Commission's Section 276(b) regulations, and the Commission has ruled that Section 276 requires timely compliance with the NST. *Wisconsin Order* at 2052 ¶ 2.

[20] *See United States Telecom Ass'n v. FCC,* 359 F.3d 554, 565-68 (D.C. Cir.), *cert. denied. sub nom. Nat'l Ass'n of Regulatory Utility Comm'rs v. United States Telecom Ass'n,* 543 U.S. 925 (2004) ("*USTA II*").

absent affirmative evidence of authority to do so." *Id.* at 566. Specifically, in *USTA II* the court held that the Commission had unlawfully subdelegated its Congressionally assigned task of making Section 251 (d)(2) competitive impairment determinations[21] by allowing the states to "make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets, with FCC oversight neither timely nor assured." *Id.* at 567.

Like the competitive-impairment decision-making addressed in *USTA II*, Section 276 decision-making also was lodged with the Commission alone. As in *USTA II*, the Commission has allowed states to "make crucial decisions regarding . . . application of the FCC's general [NST] standard" to the "specific circumstances" in each state. *Id.* Under the plan adopted in the *First Payphone Reconsideration Order*, the Commission allowed state commissions a major role, in clearly "crucial" decisions, including the determination whether, after assessing excessive payphone line charges for five to nine years in clear violation of the NST, the Bell Companies must refund the amounts unlawfully collected from PSPs. Leaving such a "crucial" decision to the states cannot survive scrutiny under *USTA II* unless the Commission exercises timely and effective oversight of the states' decisions. *Id.*

The subdelegation case law reviewed in *USTA II* clearly demonstrates the critical importance of active FCC scrutiny of state determinations such as those allowed by the *Payphone Orders*. As the court explained, federal agencies may legitimately rely on state agencies to perform limited functions such as fact gathering, the provision of policy recommendations, and even actual determinations of relevant issues, but only if the federal

[21] Section 251(d)(2) required the Commission to apply a competitive impairment test to determine which network elements incumbent LECs must make available to competitors. 47 U.S.C. § 251(d)(2). In response to an earlier court remand requiring more specific and "nuanced" impairment determinations, the Commission decided to rely upon the states to make market-by-market determinations of impairment. *USTA II* at 563-64.

agency itself controls the process and retains final decision-making authority. *Id.* at 567-68. For example, in an earlier case where the D.C. Circuit had allowed a federal agency to utilize the processes of state agencies or other outside parties as "a reasonable 'shortcut' . . . to satisfy one of the [agency's] own regulatory requirements," the court stressed that it permitted the "shortcut" because "the process was 'superintended by the [agency] in every respect,'" so that "no subdelegation of decision-making authority had actually taken place."[22]

Therefore, while the Commission's reliance on the states to conduct NST review may be otherwise justifiable under *Tabor* and *USTA II*, the Commission has an obligation to "superintend [the NST review process] in every respect." In part because the Commission failed to exercise sufficient oversight over the states' initial review of payphone line rates, the Bell Companies have managed to maintain their noncompliant rates for five-plus years. Now it is up to the Commission to ensure an effective remedy for the Bell Companies' extended noncompliance. Where reliance on state commissions as a regulatory "shortcut" has proven inadequate to ensure Section 276 compliance, the Commission must exercise its supervision to ensure retroactive compliance. If not, the Commission will have allowed the permissible use of state commissions as "shortcuts" to deteriorate into unlawful subdelegation of federal decision-making.

Congress clearly contemplated that the Commission would implement the federal scheme in a uniform manner and has provided the Commission with ample authority to supervise the

22 *Id.* at 567 (*quoting Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 708 n. 5 (D.C. Cir. 1977), where a federal board charged with certifying actuaries to administer ERISA pension plans was permitted to require applicants "*either* to pass a Board exam *or* to pass an exam administered by one of the recognized private national actuarial societies" (emphasis original)). This is arguably similar to the Commission's requirement for Bell Companies to submit their rates for NST review either with the state public service commission, or, if the state commission is unable to conduct the review, with the Commission itself. *First Payphone Reconsideration Order* at 21308 ¶ 163.

states' performance of the NST review functions necessary to carry out the uniform federal scheme. Under Section 276(c) the Commission's regulations shall preempt "any State requirements [to the extent that they] are inconsistent with the Commission's regulations." *Id.* § 276(c). Thus, the Act plainly preempts any state requirements that would permit a Bell Company to remain out of compliance with the NST after April 15, 1997.

The state commission and court orders at issue in this proceeding are clearly subject to preemption. To the extent that state commissions and/or courts denied refunds based on state law, the state rulings are indisputably "inconsistent with the Commission's regulations" requiring timely compliance with the NST. For example, the Illinois Commerce Commission ("ICC") denied refunds of the non-NTS-compliant payphone line charges collected by AT&T from April 15, 1997, through December 13, 2003, on the grounds that its pre-1996 approval of AT&T's rates under state law survived the enactment of Section 276, so that awarding refunds for the AT&T's violation of Section 276 would conflict with state law on retroactive ratemaking.[23] By allowing the Bell Companies to remain out of compliance with the NST for years after the April 15, 1997, compliance deadline, the ICC's ruling is patently inconsistent with the Commission's regulations and is preempted by Section 276(c). Even though the ICC, at the time it completed the proceeding, could not do anything about the fact that the Bell Companies had missed their compliance deadline by six-and-a-half years, he ICC could and should have canceled out that non-compliance and ensured compliance retroactively by requiring refunds. By failing to do so, the ICC failed to ensure that the Bell Companies complied with Section 276 and therefore acted inconsistently with the Commission's Section 276 regulations. The ICC decision, therefore,

[23] Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order at 42 (November 12, 2003) ("*ICC Order*"). The ICC denied refunds on the grounds that "[b]oth the United States Supreme Court and the Illinois Supreme Court have ruled that rates that have been reviewed and approved by the appropriate regulatory agency cannot be later subject to refund." *Id.* (citations omitted).

must be preempted. Similarly, other state commission and/or court decisions that deny refunds based on state law and/or misinterpretations of this Commission's orders must be preempted as inconsistent with this Commission's Section 276 rules.[24]

Correcting the states' rulings on the refund issue does not unreasonably interfere with state proceedings. Under the *Payphone Orders*, a state commission was not *compelled* to review payphone line rates and ensure compliance with Section 276, if for some reason it could not or would not do so. As with Section 251 of the Act, if a state commission determined that it lacked authority or was otherwise "unable" to enforce Section 276, it was free to decline to review the tariffs[25] and refer the matter to the FCC so that the Commission itself could conduct the necessary review. *First Payphone Reconsideration Orde*r at 21308 ¶ 163. If, on the other hand, a state commission determined that it did have the ability to ensure compliance with Section 276, it had an obligation to do so in accordance with federal law, including providing the remedy necessary to cure Section 276 violations.[26]

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24 Specifically, the decisions of the New York appellate court and Mississippi and Florida public service commissions must be preempted. APCC will address in a separate ex parte to be filed shortly why the Bell Companies' "res judicata" arguments do not pose any barrier to the Commission overruling state commission and court decisions that incorrectly interpret or apply Section 276 and the Commission's *Payphone Orders*.

25 *See, e.g.*, Virginia State Corporation Commission, *Petition of Paytel Communications, Inc., et al. for rejection of and investigation of tariffs filed by Virginia local exchange carriers pursuant to § 276 of the Telecommunications Act of 1996*, Case No. PUC970029, Final Order (May 11, 2001) (finding that the Virginia commission is unable to review LECs' payphone line rates for compliance with the NST and referring the matter to the FCC).

26 Whatever its requirements may be with respect to refunds, the Bureau's *limited* waiver of the NST compliance deadline in the *Waiver Order* cannot excuse the Bell Companies from providing reparations for their violation of the Act. Neither the Bureau nor the Commission has authority to waive a statutory requirement. *See Schools and Libraries Universal Service Support Mechanism*, Fifth Report and Order, 19 FCC Rcd 15808 at ¶ 29 (2004).

III. THE BELL COMPANIES ARE NOT INSULATED FROM REFUND OBLIGATIONS BY FILED RATE OR RETROACTIVE RATEMAKING DOCTRINES

A. The Filed Rate Doctrine Does Not Preclude Refunds

The filed rate doctrine cannot protect the Bell Companies from being required to refund charges collected in excess of NST-compliant rates. As a threshold matter, the federal filed rate doctrine does not even apply, because the rates at issue were not filed in federal tariffs.[27]

Further, any filed rate doctrine that might otherwise be applicable under state law cannot be applied if it interferes with the enforcement of Section 276. Under the Supremacy Clause, a Bell Company cannot be insulated by state law from reparations for its violation of federal law. This is especially clear in the context of Section 276, which explicitly states that state requirements conflicting with federal regulations are preempted. 47 U.S.C. § 276(c).

Even if the federal filed rate doctrine could be deemed somehow applicable by proxy as a result of the Commission's delegation of NST review to state commissions, it is clear that nothing in the filed rate doctrine prohibits state commissions from ordering reparations for a Bell Company's violation of the Act. As explained below, it has been repeatedly held that the filed rate doctrine does not apply to the provision of reparations when necessary to enforce the same statute that the doctrine is supposed to protect. Moreover, even in those few cases where the filed rate doctrine has been applied to claims under the Act, it has only been applied against enforcement of the Act by a court, never to enforcement by the Commission itself.

The filed rate doctrine is said to have two purposes. The first is to prevent carriers such as the Bell Companies from offering discriminatory or preferential rates.[28] Accordingly, the doctrine generally precludes a carrier from providing refunds as a result of the application of

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27 The federal filed rate doctrine is based on Section 203's prohibition against deviation by a carrier from "the charges specified in the schedule then in effect." 47 U.S.C. § 203(c)(3).

28 *See Hill v. BellSouth Telecomms., Inc.,* 364 F.3d 1308, 1316 (11th Cir. 2004) ("*Hill*").

state or federal laws *other* than the Communications Act.[29] The doctrine does *not* prevent the Commission (or, by proxy, state commissions) from awarding damages as the required remedy for violations of the Communications Act itself. If it did, the doctrine would have the absurd result that, in order to prevent the assessment of unlawfully discriminatory rates, the Commission would be precluded from awarding damages for a carrier's imposition of an unlawfully discriminatory rate!

Not surprisingly, therefore, the Supreme Court has made clear that the filed rate doctrine does not bar a customer from seeking reparations under the Communications Act for a discriminatory rate that violates the same statute from which the doctrine arises. Specifically, in *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), where the Supreme Court held that a reseller's contract and tort claims were barred by the filed rate doctrine, the court expressly stated that, "[t]o the extent respondent [the reseller] is asserting discriminatory treatment, its remedy is to bring suit under § 202 of the Communications Act." *Id.* at 226 (footnote omitted).

Similarly, the filed rate doctrine does not preclude the award of damages for an unreasonable rate violating Section 201(b). As explained in *Maislin Industries, U.S., v. Primary Steel, Inc.*, 497 U.S. 116 (1990):

> The filed rate doctrine . . . contains an important caveat: the filed rate is not enforceable if the [Interstate Commerce Commission] finds the rate to be unreasonable.

Id. at 128. Similarly, *Reiter v. Cooper*, 507 U.S. 258 (1993), where a carrier's trustee in bankruptcy sued its customer for collection of the filed rate, and the carrier's customer

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[29] Thus, recent Communications Act cases applying the filed rate doctrine generally have dealt with claims arising under contract, tort, or antitrust law. *See, e.g., Marcus v. AT&T Co.*, 138 F.3d 46 (2d Cir. 1998) ("*Marcus*"); *Hill; Bryan v. BellSouth Comms., Inc.*, 377 F.3d 424 (4th Cir. 2004).

counterclaimed that the rate was unreasonable, the Supreme Court required the lower court to hold the case in abeyance pending the agency's determination whether the rate was reasonable, but denied the trustee's request for a ruling that the unreasonableness counterclaim was barred by the filed rate doctrine. The court held that the Interstate Commerce Act's ("ICA's") filed rate doctrine does not "preclude[] shippers from asserting (by way of claim or counterclaim) the reparations rights explicitly conferred by [the ICA itself]."[30]

Like the Interstate Commerce Act at the time of *Reiter*, the Communications Act specifically provides for reparations for rates that violate the Act. See 47 U.S.C. §§ 206-208. As explained by the court in *Davel*, "the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff." 2006 WL 1727426 at *5. This principle applies *a fortiori* in this proceeding. Here, application of the filed rate doctrine to deny refunds of non-NST-compliant rates would frustrate enforcement of a specific provision of the Act, Section 276 that is explicitly intended to *preclude* non-NST-compliant rates. Indeed, as discussed above, the purpose of the NST requirement is *precisely* to carry out the nondiscrimination requirement of Section 276(a)(2). The application of the filed rate doctrine would lead to absurdity by frustrating enforcement of the same law that the doctrine is supposed to uphold.

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[30] In one case, *Goldwasser v. Ameritech Corp.*, 222 F.3d. 390, 391, 402 (7th Cir. 2000), in which consumers brought both antitrust claims and Communications Act claims – primarily arising under Sections 251 and 271 of the Act – the Seventh Circuit did dismiss even the Communications Act claims, ruling that the filed rate doctrine bars *courts* from awarding damages even for violations of the Communications Act where the rates were previously filed with regulatory commissions. *Id.* at 402. The court's reasoning of this case seems inconsistent with the Supreme Court cases discussed above. In any event, *Goldwasser* did not address the *Commission's* authority to award reparations after determining that previously tariffed rates are unreasonable or unreasonably discriminatory.

Finally, granting of refunds in these cases would not single out individual PSPs for preferential treatment – the refund remedy is generally available to any PSP who was assessed non-NST-compliant rates.

The second purpose of the filed rate doctrine is said to be to prevent courts from trespassing into the regulatory agency's ratemaking process and thereby to "preserve[e] the exclusive role of federal agencies in approving rates for telecommunications service that are reasonable." *Marcus*, 138 F.3d at 58; *Hill*, 364 F.3d at 1317. The cases before the Commission provide no basis for invoking the "nonjusticiability" branch of the filed rate doctrine, because the reasonableness of the rates was at issue before state public service commissions, not courts.

B. Granting Refunds Does Not Constitute Retroactive Ratemaking Under Federal Law

The PSPs' entitlement to refunds for charges in excess of NST-compliant rates is equally unaffected by the "retroactive ratemaking" doctrine. Unlike the filed-rate doctrine, which addresses rates that are "legally" tariffed but not necessarily "lawful," the retroactive ratemaking doctrine comes into play only when a regulatory agency has determined that the "legal" rate is also the "lawful" rate. *Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Rwy. Co.*, 284 U.S. 370 (1932).

In the absence of such a determination, the mere fact that a rate has been filed and allowed to take effect does not make it lawful under the governing statute, and does not bar refunds if the rate is subsequently found unlawful.[31] In this regard, the case law clearly distinguishes the Commission's ratemaking processes under Sections 204-205, which are quasi-

[31] *See Virgin Islands Telephone Corp. v. FCC*, 444 F. 3d 666, 669 (D.C. Cir. 2006) (explaining the difference between "legal" and "lawful"rates); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002) (same). *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) and cases cited therein at nn. 33-46.

legislative in nature and are used to determine *prospectively* the lawfulness of a new or revised rate, from its complaint processes under Section 208, which are *adjudicative* in nature and can be used to determine *retroactively* the lawfulness of a tariffed rate. Absent special statutory exceptions, the fact that a rate has been filed and allowed to take effect without a challenge to its lawfulness does not prevent the rate from being found unlawful and damages awarded in a Section 208 complaint proceeding. While, in the case of certain federally filed tariffs, retroactive refunds may not be available, this exception is inapplicable to the Bell Companies' state-tariffed payphone line rates, of course, since they were not filed pursuant to the streamlined federal procedure.[32]

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32 It is only where the statute expressly so provides that legally filed rates are automatically "deemed lawful" *See, e.g.*, 47 U.S.C. § 204(a)(3). In the case of the Communications Act, it is only since the enactment of the Telecommunications Act that rates have been "deemed lawful" when filed, and then only if they are filed under the streamlined procedure specifically provided by Section 204(a)(3), added in 1996. This provision "effected a considerable change in the regulatory regime" by explicitly providing that a rate filed under the streamlined procedure is "deemed lawful" and thereby precluding retroactive refunds or reparations unless the Commission begins an investigation before the rate becomes effective. *ACS of Anchorage v. FCC*, 290 F.3d 403, 411 (D.C. Cir. 2002); *see also Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2176 ¶ 8 (1997) ("deemed lawful" treatment "differ[s] radically from the current practice, where a rate that goes into effect without suspension and investigation is the legal rate, leaving carriers liable for damages . . . if the tariff is subsequently found unlawful").

Qwest contends that it is unreasonable to expect state commissions to order refunds of charges in excess of NST-compliant rates, arguing that "refunds would be unlawful per se if the PAL tariffs under scrutiny had been filed at the federal level." Qwest Ex Parte at 12. Qwest is wrong. If the Bell Companies had been required to file their payphone line rates with the Commission, the Commission would have been in control of the ratemaking process and would have been able to suspend the rates and/or subject them to an accounting order pending completion of an NST review, as they did with the Bell Companies' federally filed rates for "payphone-specific" functions and features. *See, e.g., Local Exchange Carriers' Payphone Functions and Features*, Memorandum Opinion and Order, 12 FCC Rcd 17996 (1997). It is precisely because the Commission allowed the rates to be filed with and reviewed by state commissions, who had no direct regulatory responsibilities under Section 276 and who had *no* prior experience with the NST, that equity compels the Commission to ensure that PSPs do not lose their *federal* remedies for the extraordinarily long delay in the Bell Companies' compliance with *federal* law. It is particularly ironic that Qwest should make this "deemed lawful" argument, given that in the vast majority of its jurisdictions Qwest filed virtually no new or

This does not necessarily mean that retroactive ratemaking doctrines are inapplicable once a state has correctly applied the NST and has affirmatively approved a rate as Section 276-compliant. However, the fact that a state may have prescribed or approved payphone line rates as lawful under *state* law *prior* to the effective date of Section 276 cannot bar the state commission from finding the same rates *unlawful* and granting refunds under *federal law* after the effective date of Section 276. A prior state-law finding of "lawfulness" clearly cannot survive to limit state commission's powers after the radical change of law and regulatory scheme mandated by Section 276.[33]

Moreover, if a state commission found a Bell Company's payphone line rates lawful *after* the *Payphone Orders*, because it incorrectly applied the NST, the finding of lawfulness is preempted and may not bar refunds when the State commission subsequently corrects its application of the NST. 47 U.S.C. § 276(c).

CONCLUSION

For the foregoing reasons, the Commission must rule that the legally required remedy for the Bell Companies' protracted violations of the Act is for the Bell Companies to pay reparations, in the form of refunds of excess payphone line charges from April 15, 1997, until NST-compliant rates took effect. To carry out its statutory responsibilities, the Commission must order the Bell Companies to pay such reparations and must preempt any contrary state decisions.

(Footnote continued)
revised payphone service tariffs at the state or federal level, so that Qwest could not have invoked the "deemed lawful" provision even at the federal level.

[33] As noted above, the ICC based its denial of refunds on the holding that its pre-1996 approval of AT&T's payphone line rates continued in effect after the enactment of Section 276 and the effective date of the FCC's NST requirement, and thereby, under retroactive ratemaking doctrine, precluded the ICC from awarding refunds for the six-and-a-half-year period between April 15, 1997, until the effective date of NST-compliant rates. *ICC Order* at 42.